Lim Chon Jet @ Lim Chon Jat & Ors v Wee Ai Hua & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02(NCvCHW)-492–03 OF 2019
HAS ZANAH MEHAT, LEE HENG CHEONG AND CHE MOHD RUZIMA JJCA
27 SEPTEMBER 2022

Contract — Assignment — Absolute assignment — Directors of developer company guaranteed Controller of Housing ('COH') to indemnify house buyers for loss and damage they would suffer if company breached any obligation under the housing project — Developer not only delayed completion of project but houses built were structurally defective — Whether COH as regulator under housing development legislation had power to enforce its proprietary rights/chose in action under the guarantee for the benefit of the house buyers — Whether COH had validly assigned absolutely all its rights and chose in action under the Guarantee to the house buyers to enable them to sue the directors independently — Whether house buyers' action was not time-barred as time began to run against them only from the date they acquired the right to sue from the COH

The appellants were house buyers in a housing project developed by Yusen Jaya Sdn Bhd ('Yusen Jaya') of which company the respondents were the directors. When Yusen Jaya applied to the Controller of Housing ('COH') for a licence to develop the project it was required under the Housing Development (Control and Development) Enactment 1978 ('the 1978 Enactment') and the Housing Development (Control of Licensing of Developers) Rules 1980 ('the 1980 Rules') to furnish several documents in support of its application including a letter of guarantee ('the guarantee') signed by the respondents as directors of yusen jaya in favour of the COH. In the guarantee, the directors: (a) jointly and severally guaranteed the due performance of all of Yusen Jaya's obligations and ensured that the project would be fully completed until the houses were delivered to the buyers and certified fit for occupation within the stipulated period for completion; and (b) agreed to jointly and severally indemnify the house buyers in the project against all losses or damage they might suffer as a result of any breach of obligation by Yusen Jaya or its failure to complete the housing project within the stipulated period for completion. Not only was there a delay in the completion of the Yusen Jaya in the High Court ('Suit K-79') for liquidated and ascertained damages for late delivery as well as for damages for breach of contract in respect of the structural defects. The appellants were altogether awarded a total judgment sum of RM4,592,372.67 ('the judgment sum'?) in Suit K-79. Yusen Jaya's appeal against the decision was dismissed. The appellants thereafter sued COH and two others for not taking steps under the guarantee to indemnify them for the judgment sum. The suit

was discontinued when COH executed a deed of assignment ('DOA') absolutely assigning all of its rights under the guarantee to the appellants to enable them to sue the guarantors independently. Armed with the DOA and the guarantee, the appellants filed the instant suit against the respondents to recover the judgment sum from them. The High Court dismissed the suit holding that under the guarantee, the respondents had not agreed to indemnify the appellants for losses they suffered as a result of Yusen Jaya's breaches of the sale and purchase agreements it had signed with the appellants save for the covenant that it would complete the housing project by the agreed completion date. It was revealed at the trial that the appellants had received RM1,338,728 as part payment of the judgment sum. In the instant appeal against the trial court's decision, the appellant argued that the trial judge had wrongly construed the scope of the respondents' obligations under the guarantee. On the other hand, the respondents argued that: (i) the DOA was not an absolute assignment, hence the appellants had no capacity to bring the instant action in their own names without adding the COH; (ii) since the COH, as the assignor, had not suffered any loss or damages, the appellants, as the assignees, could not be in a better position and be able to recover more from the respondents than the assignor could have recovered had there been no DOA; (iii) the judgment sum was not binding on the respondents as they were not parties to Suit K-79; (iv) since the guarantee was a statutorily-required document under the 1978 Enactment and not a commercial one, COH could not assign its statutory duties under the guarantee to the appellants just so that they could commence legal action against the respondents; and (v) the appellants' claim was time-barred under s 3 of the Sabah Limitation Ordinance.

Held, unanimously allowing the appeal, setting aside the High Court's decision, and holding the respondents jointly and severally liable to pay the appellants RM3,253,644.67, being the balance judgment sum owing in Suit K-79, with interest thereon at 5%pa from date of filing of the action until date of settlement:

(1) The respondents were no longer entitled to challenge the trial court's finding that the DOA was an absolute assignment within the meaning of s 4(3) of the Civil Law Act 1956 ('the CLA') because of their failure to file any appeal to vary or set aside that finding. In any event, the finding was not an appealable error as all the conditions required under s 4(3) of the CLA had been met to render the DOA an absolute assignment. Even if the DOA did not comply with s 4(3) of the CLA, the appellants could still exercise their rights as equitable assignees (see paras 24–25 & 29–30).

(2) As a regulator or a custodian of the 1978 Enactment, the COH was well-equipped with the power to ensure that the appellants' rights were protected. When Yusen Jaya failed to observe its obligations under the housing project, the COH had a proprietary right or chose in action to enforce the guarantee against the respondents on behalf of the appellants,

even though the COH itself had not suffered any loss or damage. The guarantee was meaningless if COH did not have that right. The guarantee was not an assignment of a bare right to take action or to litigate because the appellants had a genuine and legitimate interest in taking over the assignment. The appellants were legitimately exercising their legal right to recover the judgment sum awarded in Suit K-79 (see paras 35–37).

(3) The court could not agree with the respondents' contention that the guarantee was only meant to indemnify the COH and not the appellants. It was clear under the guarantee that the respondents had agreed to jointly and severally indemnify the house buyers against all loss or damage caused to them or any of them arising or resulting from any breach of obligations by Yusen Jaya or its failure to complete the housing project by the stipulated date for completion (see paras 36 & 54–55).

(4) If the COH wished to assign its proprietary right or chose in action against the respondents to the appellants, it could do so on the basis that the appellants had a genuine commercial interest in the enforcement of the claim against the respondents. On a proper reading of the DOA, the parties clearly intended for the COH's rights to the chose in action to be absolutely transferred to the appellants. Having acquired the chose in action pursuant to the DOA, the appellants could step into the shoes of the COH and independently bring the action against the respondents under the guarantee (see para 41).

(5) The 1978 Enactment was a piece of social legislation. The rationale behind requiring the directors of a housing development company to provide the letter of guarantee was to provide a measure of protection to house buyers against unscrupulous developers. The trial judge had failed to take a purposive approach in interpreting the guarantee (see para 56).

(6) The appellants' claim against the respondents was not time-barred. The judgment sum was awarded on 27 January 2011, the appellants entered into the DOA with the COH on 10 February 2015 and thereafter the appellants filed their action on 14 September 2015 to enforce the guarantee against the respondents. On those facts, time started to run against the appellants to take action against the respondents from the date of the DOA, ie, the date when the appellants acquired the right or the chose in action from the COH (see para 60).

[Bahasa Malaysia summary

Perayu-perayu ('perayu') merupakan pembeli rumah dalam projek perumahan yang dibangunkan oleh Yusen Jaya Sdn Bhd ('Yusen Jaya') yang mana syarikat responden adalah pengarahnya. Apabila Yusen Jaya memohon kepada Pengawal Perumahan ('PP') untuk mendapatkan lesen untuk membangunkan projek itu, Enakmen Pemajuan Perumahan (Kawalan dan Pelesenan) 1978

('Enakmen 1978') dan Kaedah-Kaedah Perumahan (Kawalan dan Pelesenan Pemaju) 1980 ('Kaedah-Kaedah 1980') memerlukan beberapa dokumen disediakan bagi menyokong permohonannya termasuk surat jaminan ('jaminan') yang ditandatangani oleh responden sebagai pengarah Yusen Jaya yang memihak kepada PP. Dalam jaminan tersebut, para pengarah: (a) secara bersama dan berasingan menjamin kewajipan Yusen Jaya dan memastikan bahawa projek tersebut akan siap sepenuhnya sehingga rumah-rumah tersebut diserahkan kepada pembeli dan diperakui sesuai untuk didiami dalam tempoh yang ditetapkan untuk disiapkan; dan (b) bersetuju untuk bersama-sama dan sebahagian untuk membayar pembeli rumah dalam projek tersebut terhadap semua kerugian atau kerosakan yang mungkin mereka alami akibat sebarang pelanggaran kewajipan oleh Yusen Jaya atau kegagalannya untuk menyiapkan projek perumahan dalam tempoh yang ditetapkan untuk disiapkan. Terdapat kelewatan projek tersebut disiapkan oleh Yusen Jaya di Mahkamah Tinggi ('Guaman K-79') untuk ganti rugi dicairkan dan ditentukan untuk penyiapan lewat malah terdapat ganti rugi bagi pelanggaran kontrak berkenaan struktur binaan yang tidak sempurna. Perayu secara keseluruhannya diberikan jumlah penghakiman sebanyak RM4,592,372.67 ('jumlah penghakiman') dalam Guaman K-79. Rayuan Yusen Jaya terhadap keputusan tersebut ditolak. Perayu kemudiannya menyaman PP dan dua yang lain kerana tidak mengambil langkah di bawah jaminan tersebut untuk membayar ganti rugi kepada mereka bagi jumlah penghakiman. Guaman tersebut ditarikbalik apabila PP melaksanakan surat ikatan tugasan ('SIT') yang memberikan semua haknya di bawah jaminan tersebut kepada perayu bagi membolehkan mereka menyaman penjamin secara bebas. Bergantung kepada SIT dan jaminan tersebut, perayu memfailkan guaman ini terhadap responden untuk mendapatkan semula jumlah penghakiman tersebut. Mahkamah Tinggi menolak guaman tersebut dengan alasan bahawa di bawah jaminan tersebut, responden tidak bersetuju untuk membayar ganti rugi kepada perayu atas kerugian yang mereka alami akibat pelanggaran perjanjian jual beli Yusen Jaya yang telah ditandatanganinya dengan perayu dengan syarat perumahan tersebut disiapkan pada tarikh yang dipersetujui. Perbicaraan telah menunjukkan bahawa perayu telah menerima RM1,338,728 sebagai sebahagian bayaran daripada jumlah penghakiman tersebut. Dalam rayuan ini terhadap keputusan mahkamah perbicaraan, perayu menghujahkan bahawa hakim perbicaraan telah salah arah ketika menafsirkan skop tanggungjawab responden di bawah jaminan tersebut. Sebaliknya, responden berhujah bahawa: (i) SIT tersebut bukanlah tanggungjawab mutlak, oleh itu perayu tidak mempunyai kapasiti untuk membawa tindakan ini atas nama mereka sendiri tanpa menambah PP; (ii) kerana PP, sebagai pemegang serah hak, tidak mengalami sebarang kerugian atau ganti rugi, perayu, sebagai pemegang serah hak, tidak boleh berada dalam kedudukan yang lebih baik dan dapat memperoleh lebih banyak daripada responden daripada pemegang serah hak yang mungkin ada sekiranya tiada SIT tersebut; (iii) jumlah penghakiman tersebut tidak mengikat responden kerana mereka bukanlah pihak dalam

Guaman K-79; (iv) kerana jaminan tersebut adalah dokumen statutori di bawah Enakmen 1978 dan bukannya dokumen komersial, oleh yang demikian PP tidak boleh menyerahkan tugas berkanunnya di bawah jaminan tersebut kepada perayu supaya mereka boleh memulakan tindakan terhadap responden; dan (v) tuntutan perayu adalah dihadkan oleh masa menurut s 3 Ordinan Limitasi Sabah.

Diputuskan, sebulat suara membenarkan rayuan, mengenepikan keputusan Mahkamah Tinggi, memutuskan responden bertanggungan secara bersesama dan berasingan untuk membayar perayu RM3,253,644.67, iaitu lebihan jumlah penghakiman yang terhutang di Guaman K-79, dengan faedah sebanyak 7% setahun dari jumlah pemfailan kes hingga tarikh penyelesaian:

(1) esponden tidak lagi berhak mencabar dapatan mahkamah perbicaraan bahawa SIT adalah tugasan mutlak menurut s 4(3) Akta Undang-Undang Sivil 1956 ('Akta') kerana kegagalan mereka memfailkan rayuan untuk mengubah atau mengenepikan penghakiman tersebut. Dalam apa jua keadaan, penghakiman tersebut bukanlah satu kesilapan yang boleh dirayu kerana semua syarat yang diperlukan di bawah s 4(3) Akta telah dipenuhi untuk menjadikan SIT tersebut sebagai tugasan mutlak. Walaupun SIT tidak mematuhi s 4(3) Akta, perayu masih boleh menggunakan hak mereka sebagai pemegang serah hak menurut ekuiti (lihat perenggan 24–25 & 29–30).

(2) Sebagai pengawal selia atau pelaksana Enakmen 1978, PP mempunyai kuasa untuk memastikan hak perayu dilindungi. Apabila Yusen Jaya gagal mematuhi kewajipannya di bawah projek perumahan tersebut, PP mempunyai hak proprietari atau memilih tindakan untuk menguatkuasakan jaminan tersebut terhadap responden bagi pihak perayu, walaupun PP tersebut sendiri tidak mengalami sebarang kerugian atau kerosakan. Jaminan tersebut tidak mempunyai makna sekiranya PP tidak mempunyai hak tersebut. Jaminan tersebut bukanlah penyerahan hak kosong untuk mengambil tindakan atau memulakan tindakan litigasi kerana perayu mempunyai kepentingan yang tulen dan sah dalam mengambil alih tugasan tersebut. Perayu secara sah menjalankan hak undang-undang mereka untuk mendapatkan semula jumlah penghakiman yang dibenarkan di dalam Guaman K-79 (lihat perenggan 35–37).

(3) Mahkamah ini tidak bersetuju dengan hujah responden bahawa jaminan tersebut hanya bertujuan untuk membayar ganti rugi PP dan bukan perayu. Adalah jelas di bawah jaminan bahawa responden telah bersetuju untuk bersama-sama dan berasingan membayar ganti rugi kepada pembeli rumah terhadap semua kerugian atau kerosakan yang disebabkan oleh mereka atau mana-mana daripada mereka yang timbul daripada sebarang pelanggaran kewajipan oleh Yusen Jaya atau

kegagalannya untuk menyiapkan projek perumahan pada tarikh yang ditetapkan untuk disiapkan (lihat perenggan 36 & 54–55).

(4) Sekiranya PP ingin memberikan hak proprietari atau memilih tindakan terhadap responden kepada perayu, mereka berhak atas dasar bahawa perayu mempunyai kepentingan komersial yang tulen dalam penguatkuasaan tuntutan terhadap responden. Menurut tafsiran SIT yang betul, pihak-pihak jelas berhasrat untuk PP mempunyai hak untuk memilih tindakan untuk dipindahkan sepenuhnya kepada perayu. Setelah memperoleh pilihan dalam tindakan menurut SIT tersebut, perayu boleh bergantung kepada PP dan secara bebas membawa tindakan terhadap responden di bawah jaminan tersebut (lihat perenggan 41).

(5) Enakmen 1978 adalah undang-undang sosial. Tujuan keperluan pengarah sebuah syarikat pembangunan perumahan menyediakan surat jaminan adalah untuk perlindungan kepada pembeli rumah terhadap pemaju yang tidak bertanggungjawab. Hakim perbicaraan telah gagal mengambil pendekatan purposif dalam menafsirkan jaminan tersebut (lihat perenggan 56).

(6) Tuntutan perayu terhadap responden tidak dihalang masa. Jumlah penghakiman adalah pada 27 Januari 2011, perayu telah memeterai SIT dengan PP pada 10 Februari 2015 dan selepas itu perayu memfailkan tindakan mereka pada 14 September 2015 untuk menguatkuasakan jaminan tersebut terhadap responden. Berdasarkan fakta-fakta tersebut, had masa bermula untuk perayu untuk mengambil tindakan terhadap responden dari tarikh SIT, iaitu tarikh perayu memperoleh hak atau memilih tindakan daripada PP (lihat perenggan 60).]

Cases referred to

Ang Ming Lee v Menteri Kesejahteraan Bandar [2020] 1 MLJ 281, FC (distd)
Bank Pembangunan Malaysia Bhd v Spring Hill Bioventures Sdn Bhd [2020] 4 MLJ 42; [2020] 4 CLJ 15, CA (refd)
Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (folld)
Bounty Dynamics Sdn Bhd v Chow Tat Ming & 175 ors [2016] 1 MLJ 507, CA (refd)
City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd [1985] 1 MLJ 285, FC (refd)
City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd [1988] 1 MLJ 69, PC (refd)
Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors [2016] 5 MLJ 557; [2016] 8 CLJ 149, FC (folld)
Khau Daw Yau v Kin Nam Realty Development Sdn Bhd [1983] 1 MLJ 335 (refd)

Kong Ming Bank Berhad v Leong Ho Yuen [1982] 2 MLJ 111, FC (refd)
Lim Chon Jet @ Lim Chon Jat & Ors v Yusen Jaya Sdn Bhd [2011] 5 MLJ 239; [2011] 8 CLJ 598, HC (refd)
Loh Wai Lian v SEA Housing Corporation Sdn Bhd [1987] 2 MLJ 1, PC (refd)
MBf Insurans Sdn Bhd v Lembaga Penyatuan & Pemulihan Tanah Persekutuan (FELCRA) [2008] 2 MLJ 398; [2007] 6 CLJ 639, CA (refd)
Mohamed Tawfik bin Tun Dr Ismail v HLG Credit Sdn Bhd & Another [2012] 2 MLJ 626, CA (refd)
Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268, FC (refd)
Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad [1989] 3 MLJ 155, SC (refd)
PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals [2021] 2 MLJ 60, FC (refd)
Palm Oil Research and Development Board Malaysia v Premium Vegetables Oils Sdn Bhd [2005] 3 MLJ 97, FC (distd)
Public Finance Bhd v Scotch Leasing Sdn Bhd (in receivership) (Perwira Habib Bank Malaysia, Intervener) [1996] 2 MLJ 369; [1996] 3 CLJ 635, FC (refd)
SEA Housing Corp Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31, SC (refd)
South East Asia Insurance Bhd v Nasir Ibrahim [1992] 2 MLJ 355; [1992] 4 CLJ 1801, SC (refd)
The Pacific Bank Bhd (sued as guarantor) v Kerajaan Negeri Sarawak [2014] 6 MLJ 153, FC (refd)
Trendtex Trading Corp v Credit Suisse [1980] 3 All ER 721, HL (refd)
UMW Industries Sdn Bhd v Ah Fook [1996] 1 MLJ 365; [1996] 1 CLJ 379, FC (refd)
Yeoman Credit Ltd v Latter & Anor [1961] 2 All ER 294, CA (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)
Contracts Act 1950 ss 77, 79
Courts of Judicature Act 1964 s 67(1)
Housing Development (Control and Development) Enactment 1978 (No 24 of 1978) Part II
Housing Development (Control and Licensing) Act 1966 r 12
Housing Development (Control and Licensing) Rules 2008
Housing (Control and Licensing of Developers) Rules 1980 (repealed by the Housing Development (Control and Licensing) Rules 2008 r 3(1), Schedule A
Limitation Ordinance (Cap 72) s 3

Appeal from: Suit No BKI-22NCVC-104/9 of 2015 (High Court, Kota Kinabalu)

Alex Decena (with Jordan Kong) (Jayasuria Kah & Co) for the appellant.

Colin Lau (with Kelvin Wong) (Baldev Gan & Assoc) for the respondent.

Che Mohd Ruzima JCA:

INTRODUCTION

[1] This is an appeal by Lim Chon Jet @ Lim Chon Jat and 45 others ('appellants/plaintiffs'), who are appealing against the whole decision of the learned High Court judge ('LHCJ') delivered on 14 February 2019. In his decision, the LHCJ dismissed with cost the appellants'/plaintiffs' action seeking to enforce the statutory guarantee/indemnity against Wee Ai Hua and Wee Kok Hui ('respondents/defendants').

[2] For ease of reference, parties in this appeal will be referred to as in the trial court, the plaintiffs and the defendants.

BRIEF BACKGROUND FACTS

[3] In 2002, a developer company, Yusen Jaya Sdn Bhd ('Yusen Jaya') applied to the Controller of Housing ('COH') for amongst others, a licence to develop a housing project called Taman Bukit Saujana Springfields Homes located at Jalan Bantayan, Off Jalan Tuaran Mile 31/2, Kota Kinabalu, Sabah ('the housing project').

[4] Yusen Jaya was required under the provisions of the Housing Development (Control and Development) Enactment 1978 ('the 1978 Enactment') and the Housing Development (Control of Licensing of Developers) Rules 1980 ('the 1980 Rules') to furnish several documents and standard forms in support of their application. Amongst all these documents which had been furnished by Yusen Jaya to the COH, was the letter of guarantee of completion of housing development by Directors dated 11 June 2002 ('the guarantee'). The 1980 Rules had been repealed and replaced with the Housing Development (Control and Licensing) Rules 2008.

[5] The guarantee was in the prescribed form, found in Appendix B of Schedule A in the 1980 Rules. The guarantee was signed by the directors of Yusen Jaya, namely, Ten Kuet Fah ('TKF'), the first and second defendants. Subsequently, the defendants with or without TKF had issued five identical letters of guarantee upon request from the COH. In 2009, TKF resigned as Yusen Java's director. Whereas, the first and second defendants were and still are the directors of Yusen Jaya. The defendants did sign the subsequent letters of guarantee after the resignation of TKF.

[6] The plaintiffs are buyers of 46 residential houses in the housing project.

A On various dates, the plaintiffs entered into a sale and purchase agreement ('SPA') with Yusen Jaya. It was not disputed that there was a delay in completing the housing project by Yusen Jaya.

B **[7]** Upon taking possession of the houses, the plaintiffs discovered that there were structural defects in their houses. They filed usual complaints warranted under the SPA which Yusen Jaya failed to remedy. As a result, the plaintiffs commenced a suit No K22–79–2006-I (Suit K-79) against Yusen Jaya claiming, inter alia, liquidated ascertained damages ('LAD') for late delivery of the houses and damages for breach of contract on the ground that the construction of the houses which they had purchased were seriously defective.

C

D **[8]** The plaintiffs' claim for LAD was based on the number of days of delay calculated from the date of the SPA until the date of the issuance of the Occupation Certificates ('OC'). The delays ranged from 47 days to 246 days as can be seen in the reported case at p 247 (MLJ); 606 (CLJ) of *Lim Chon Jet @ Lim Chon Jat & Ors v Yusen Jaya Sdn Bhd* [2011] 5 MLJ 239; [2011] 8 CLJ 598.

E **[9]** The plaintiffs obtained judgment against Yusen Jaya for damages in failing to construct the houses in accordance with the SPA which included LAD for late delivery of the houses. The total damages awarded against Yusen Jaya in Suit K-79 was RM4,593,372.67 ('judgment sums').

F **[10]** The plaintiffs' solicitors had by their letter dated 24 February 2011 requested the COH to process payment for the plaintiffs' judgment sums and their entitlement to be indemnified under the guarantee. When the COH failed to pay the plaintiffs the judgment sums, the plaintiffs sued the COH and two others in Suit BKI-22NCvC-32–12 of 2013 ('Suit BKI-32'). However, sometimes in February 2015, the plaintiffs and the COH came to a compromise. In consideration of the COH assigning all rights under the Guarantee to the plaintiffs via a deed of assignment dated 10 February 2015 ('DOA 2015') to enable the plaintiffs to commence legal action against the guarantors, the plaintiffs undertook to discontinue Suit BK-132 against the COH and two others.

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I **[11]** Armed with the DOA 2015 and the guarantee, the plaintiffs failed in this action against the defendants to recover from them the K-79 judgment sums. The defendants denied liability and defended against the plaintiffs' claim.

HIGH COURT'S DECISION

[12] The LHCJ was of the view that there were three issues to be decided and those three issues are as follows:

(a) whether the DOA 2015 is an absolute assignment in writing within the meaning of s 4(3) of the Civil Law Act 1956;

(b) if the answer is yes, then upon express notice in writing being given to the defendants, the DOA 2015 shall be deemed to have been effectual in law, and the plaintiffs shall be entitled to bring this action against the defendants in their own names, without joining the assignor, namely the COH as a party to this action; and

(c) what is the scope of the defendants' obligations under the terms of the guarantee?

[13] The LHCJ dealt with the first and second issue together. Guided by the principles set out by the Federal Court in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 and upon reading the DOA 2015 as a whole, the LHCJ found that the DOA 2015 is an absolute assignment within the meaning of s 4(3) of the Civil Law Act 1956 ('the CLA 1956'). The LHCJ also found that the plaintiffs had by letters dated 14 May 2015 given an express notice in writing of the DOA 2015 to the defendants. Following the Court of Appeal decision in *Mohamed Tawfik bin Tun Dr Ismail v HLG Credit Sdn Bhd & Another* [2012] 2 MLJ 626 the LHCJ held that the notice of need not be a formal notice. As long as information relating to the DOA 2015 was conveyed to the defendants, they had notice of the assignment.

[14] As to the third issue, the LHCJ found that the guarantee given by the defendants to the COH was to ensure the full completion of the housing project within the stipulated time for completion, and for the due performance of the several obligations of Yusen Jaya in relation to the completion of the housing project. In Suit K-79, the plaintiffs chose to uphold the sale and purchase agreements, accept the completion of the houses, and sue for LAD and damages for defective works. In such a case, the damages awarded in Suit K-79 was not for Yusen Jaya's failure to complete the housing project, except that a small part of the judgment sums, namely the sum of RM305,681.67 which was awarded for LAD, for failure to complete the houses within the stipulated period of completion. The defendants had not agreed to indemnify the plaintiffs for losses which they may have suffered as a result of Yusen Jaya's breaches of the SPA, save to complete the housing project within the stipulated time of completion. The LHCJ recognised that the plaintiffs had received a sum of RM1,338,728 as partial settlement of the judgment sum awarded in the K-79 Suit. This sum for partial settlement had exceeded the LAD awarded in Suit K-79, which is RM305,681.67. On a balance of probabilities, the LHCJ

found that the plaintiffs had failed to prove their case against the defendants and dismissed the claim with costs of RM25,000 to the defendants.

THE APPEAL

[15] In the amended memorandum of appeal, the plaintiffs' appeal was based on the ground that the LHCJ erred in law and in facts when His Lordship misconstrued the scope of the defendants' contractual obligations as guarantors and indemnitors under the guarantee. In summary, counsel for the plaintiffs' submission before us are as follows:

(a) the LHCJ was right in holding that the DOA 2015 satisfies the three conditions stated in s 4(3) of the Civil Law Act 1956;

(b) the law of maintenance and champerty does not apply to the facts and circumstances of the plaintiffs' claim. Instead, the law of maintenance and champerty is to 'protect the purity of justice and the interests of vulnerable litigants';

(c) the guarantee can be assigned. It is not an assignment of a bare right to action or to litigate because the plaintiffs have a genuine commercial interest in taking the assignment and enforcing it for their own benefit;

(d) the 1978 Enactment and the 1980 Rules do not prohibit assignment. In the absence of a validity period clause, the guarantee is not limited in time. Therefore, the guarantee is valid and subsisting;

(e) the guarantee ought to be interpreted liberally and in accordance with the purposive rule. The LHCJ had failed to apply the purposive rule, and as a result, the LHCJ failed to consider the purpose of the social legislation and the Legislature's intention to mitigate the unequal bargaining power between home buyers and housing developers;

(f) the guarantee indemnifies the purchasers of all losses suffered from any breach of obligation committed by the Yusen Jaya under the SPAs. The LHCJ interpreted the guarantee illogically because the interpretation preferred by the LHCJ does not make business sense;

(g) the LHCJ erred when His Lordship failed to recognise that the guarantee is an exception to the principle of a separate legal entity. Where legislation requires a personal guarantee of a director to be given for and on behalf of its company, the Legislature must have intended for the separate legal entity principle to be disregarded;

(h) the LHCJ erred when he applied the *contra proferentum* rule in interpreting the guarantee when there is no ambiguity in the terms of the guarantee and the terms of the guarantee are standard terms enacted by legislation to protect house buyers from unscrupulous developers;

(i) the LHCJ erred when he noted that the plaintiffs were entitled to claim the return of the purchase price due to a total failure of consideration; and

(j) the plaintiffs filed their action against the defendants within time.

[16] Counsel for defendants submitted that the LHCJ made no error in law or in facts that warrant appellate intervention. In construing the guarantee as a whole, the LHCJ was right in dismissing the plaintiffs' claim against the defendants for the judgment sums in Suit K-79. His Lordship did not make any mistake in finding that the defendants had not agreed to indemnify the plaintiffs for the losses which they had suffered as a result of Yusen Jaya's breaches of the SPA save to complete the housing project within the stipulated time of completion. Counsel for the defendants further submit that the LHCJ ought also to have dismissed the plaintiffs' claim in this action on the following grounds:

(a) the plaintiffs' own pleaded case was that by the guarantee the defendants agreed to jointly and severally indemnify the COH against all loss or damage caused to the plaintiffs or any of them arising or resulting from any breach of obligations by Yusen Jaya, or their failure to complete the housing project within the agreed time for completion. However, the words in cl 2 of the guarantee, in their plain, ordinary, and popular meaning, indicate that it was intended to indemnify the COH rather than the plaintiffs;

(b) cl 2 of the guarantee is not an indemnity as defined under s 77 of the Contracts Act 1950 ('the CA 1950') neither a guarantee as defined under s 79 of the CA 1950. It envisages at least a further step was needed to be taken, that is, for the directors of Yusen Jaya to enter into a guarantee or indemnity with the purchasers to guarantee or indemnify them of their losses. Clause 2 at best is akin to an agreement to agree;

(c) at the trial, there was no evidence led to prove that the COH had suffered any damages or losses, nor had the COH demanded or sought or informed the defendants of any such damages or losses. In the circumstances of this case, the COH had no responsibility to the plaintiffs;

(d) the assignees cannot be in a better position than the assignor. An assignee cannot recover more from the debtor than the assignor could have done had there been no assignment. Therefore, as the COH suffered no loss or damage nor was he even in law liable to the plaintiffs, the plaintiffs' claim for damage or loss is without any legal basis;

(e) Suit K-79 judgment sums is not binding on the defendants as they were not parties to that suit;

(f) the COH has no power to assign the guarantee to the plaintiffs to enable them to commence the action under the 1978 Enactment. The COH could not assign his statutory duty or right to the plaintiffs. This is also akin to a delegation of a power to do a statutory act;

(g) the DOA 2015 would have an effect of splitting the obligations of Yusen Jaya under the 1978 Enactment and the defendants as guarantors under the guarantee to the COH and hence, making the assignment impossible and void;

(h) the DOA 2015 was solely to enable the plaintiffs to commence action against the defendants under the guarantee when the COH had refused to take action against the defendants under the said guarantee and therefore amount to or had the effect of an assignment of a bare right of action which is invalid under the law;

(i) the DOA 2015 was not an absolute assignment and therefore this action could not be commenced in the sole name of the plaintiffs. The LHCJ erred in law and in fact when he held that the assignment was an absolute assignment;

(j) the DOA 2015 purportedly assigned the guarantee but by then the said guarantee had already expired, lapsed, determined or replaced by fresh letters of guarantee, identical in form and substance, signed by the defendants without TKF who had resigned as a director in 2019. As a result, by 2019, the guarantee was no longer effective or enforceable; and

(k) in any circumstances, the plaintiffs' claim was barred by s 3 of the Sabah Limitation Ordinance (the SLO').

OUR FINDINGS

[17] The background facts leading to the plaintiffs' claim against the defendants are not disputed. The plaintiffs' claim against the defendants is emanated from the judgment sums awarded by the High Court in Suit K-79. In that suit, the plaintiffs successfully made up their claim against Yusen Jaya and the defendants were not parties to it. The plaintiffs' cause of action against the defendants is based on the guarantee issued by the defendants to the COH and the DOA 2015 issued by the COH to the plaintiffs. The existence of the two contemporaneous documents is also not disputed.

[18] After having construed the submission of both parties, we summarised that the plaintiffs' appeal and the defendants' opposition to the appeal stem on three broad issues. First, the validity of the DOA 2015, second, the interpretation of the guarantee and third, if the first and the second issues favour the plaintiffs, whether the plaintiffs' claim is barred by limitation.

The validity of the DOA 2015

[19] To recap, evidence shows that Yusen Jaya applied to the COH for a housing developer licence to develop the housing project, a requirement under the 1978 Enactment in June 2002. Amongst other documents required by the COH to process and approve the licence for the housing project and later the advertisement and sale permit was the guarantee. It was on a statutory form of the COH under Part II of the 1978 Enactment and under r 3(1) of the 1980 Rules and had to be executed by all directors of Yusen Jaya including the defendants.

[20] The plaintiffs bought their houses from Yusen Jaya in the housing project and were given vacant possession of their houses in 2005. The local authority had issued the occupation certificates for all the houses in the housing project in July and October 2005. Dissatisfied with the late delivery of some of the houses and some major defects in some of the houses, the plaintiffs commenced Suit K-79 against Yusen Jaya for damages and losses in 2006. The plaintiffs succeeded in their claim at the High Court and Yusen Jaya's appeal to the Court of Appeal was dismissed.

[21] Then, the plaintiffs notified and claimed for indemnity against the COH to materialise the judgment sums given in Suit K-79. After being ignored, the plaintiffs filed Suit BKI-32 against GOH in 2013. In February 2015, the COH and the plaintiffs entered into the DOA 2015 to enable the plaintiffs to commence legal action against the defendants and TKF.

[22] Let us now look at the DOA 2015. For better understanding, it would be appropriate for us to reproduce the entire terms and conditions of the DOA 2015 which are as follows:

DEED OF ASSIGNMENT

THIS ASSIGNMENT is made the day of 10 FEB 2015.

BETWEEN

The Controller of Housing, under the Housing Control Unit of the Ministry of Local Government and Housing Sabah of 4th Floor, Block C, Wisma Tun Fuad Stephens, 88999 Kota Kinabalu (hereinafter referred to as the Assignor).

AND

The 46 persons whose names are set out in Annexure - 1 attached to this Deed of Assignment (hereinafter collectively referred to as the Assignees). Yong Sai Khuing has been authorised by the Assignees to enter into this Deed of Assignment on their behalves.

WHEREAS:

1. The Assignees are the purchasers of various properties in a housing scheme known as Taman Bukit Saujana Springfield Homes comprising of one hundred and two (102) units of residential houses of various types and designs, situated at Jalan Bantayan, Off Jalan Tuaran Mile 31/2, Kata Kinabalu, Sabah ('the Project').

2. Yusen Jaya Sdn Bhd (10047-W) is the Developer of the Project ('Yusen Jaya').

3. By Sale and Purchase Agreements entered into between the Assignees and Yusen Jaya, and another party ('the Agreements'), Yusen Jaya agreed to sell and the Assignees agreed to purchase the houses subject to the terms under the Agreements, and subject to the plans, drawings and specifications annexed to the Agreements.

4. In suit K22-79 of 2006 (K79), the Assignees sued Yusen Jaya claiming damages and loss for, among other things, delivering defective houses and delivering late possession of the houses to the Assignees.

5. After a full trial, the High Court on 27 January 2011 gave the following judgment in K79 to the Assignees:

1. The judgment sums of RM4,592,372,67;

2. Interest on the judgment sum of RM4,592,372.67 at the rate of 8% per annum from 27th January 2011 until the full settlement of the Judgment sum; and

3. Cost to be taxed unless agreed.

6. Yusen Jaya appealed the Judgment of the High Court on 27 January 2011. The Court of Appeal heard and dismissed the appeal on 11 December 2012.

7. Accordingly, by letter dated 24 February 2011 the Assignees' solicitors wrote to the Assignor informing the Assignor that the Assignees had obtained judgment against Yusen Jaya in the High Court for, among other things, RM4,592,372,67.

8. The Assignor was required to and had obtained the Letter of Guarantee dated 11 June 2002 from the Directors of Yusen Jaya, in accordance with s 5(1)(a), (3), (4) of the Housing Development (Control and Licensing) Enactment 1978, read together with Schedule A and Appendix B of the Housing Development (Control and Licensing) Rules 2008. The Directors of Yusen Jaya are T'en Kuet Fah, Wee Kok Hui and Wee Ai Hua. The Letter of Guarantee dated 11 June 2002 is marked as Annexure - 2 attached to this Deed of Assignment.

9. In the 24 February 2011 letter, the Assignees' solicitors referred to a Letter of Guarantee dated 11 June 2002 given to the Assignor by Yusen Jaya three Directors Ten Kuet Fah, Wee Kok Hui and Wee Ai Hua. Under the Letter of Guarantee, the three Directors agreed to jointly and severally indemnify the Assignees against all loss or damages caused to them or any of them arising or resulting from any breach of obligations by Yusen Jaya, or failure to complete the housing development within the agreed time for completion.

10. The Assignees solicitors' letter dated 24 February 2011 had requested the Assignor to process payment for the Assignees' judgment sum of RM4,592,372.67, and their entitlement to be indemnified for that sum under the Letter of Guarantee given by the three Directors of Yusen Jaya.

11. The Assignor has refused to pay to the Assignees the judgment sums of RM4,592,372.67, and has not taken any action to enforce the three Directors' obligations to indemnify the Assignees in accordance with the terms of the Letter of Guarantee dated 11 June 2002.

12. The Assignees then sued the Assignor & 2 others in Suit No. BKI-22NCvC-32/12-2013. The Defendants in that Suit have filed their Defence. The Suit will be called for mention on 11 February 2015.

NOW THIS DEED WITNESSETH as follows:

13. The Assignor has assigned all rights under the Letter of Guarantee dated 11 June 2002 to the Assignees to enable them to commence legal action against T'en Kuet Fah, Wee Kok Hui and Wee Ai Hua the three Directors of Yusen Jaya Sdn Bhd.

14. For and in consideration of this Deed of Assignment the Assignees undertake to discontinue Suit No. BKI-22NCvC-32/12-2013 against the Assignor and the 2nd and 3rd Defendants upon execution of this Deed of Assignment.

[The rest of this page is intentionally left blank]

IN WITNESS WHEREOF the parties have hereunto set our hands and seal the day and year first above written.

SIGNED by the Controller of Housing
the Assignor

In the Presence of:

t.t Seal	t.t Seal
MOHD FAIZAL IZUDDIN B MOHD HANAN	DATUK MATIUS SATOR
Pegawai Undang-Undang Gred L1	Setiausaha Tetap Kem. Kerajaan Tempatan & Perumahan

SIGNED by Yong Sai Khuing for and behalf of the Assignees

In presence of

t.t Seal	t.t
Eric @ Patrick Sikodol	Yong Sai Khuing
Commissioner for oaths	

[23] In answering the issue on whether the DOA 2015 is an absolute assignment in writing within the meaning of s 4(3) of the CLA 1956, the LHCJ referred to the Federal Court decision in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 and made the following finding:

> [16] Reading the DOA as a whole, I find that it is an absolute assignment within the meaning of s 4(3) of the Civil Law Act 1956. I also find that the plaintiffs had by letters dated 14 May 2015 given an express notice in writing of the assignment to the defendants. Such notice of assignment need not be a formal notice, or be given by the Housing Controller specifically, as long as information relating to the DOA was conveyed to the defendants so that they had notice of the assignment (see *Mohamed Tawfikbin Tun Dr Ismail v HLG Credit Sdn Bhd & Another* [2012] 2 MLJ 626).
>
> [17] In the premises, I find that the DOA has complied with the requirements of s 4(3) of the Civil Law Act 1956, and it shall be deemed to have been effectual in law to pass and transfer the legal chose in action to the plaintiffs. The plaintiffs are entitled to bring this action against the defendants in their own names, without joining the Housing Controller as a party. ...

[24] The plaintiffs concur with the LHCJ finding on the said issue. The defendants disagree. Counsel for the defendants submitted before us that in defending the judgment, they will regurgitate the defendants' points of defence that the learned judge erred in finding that the DOA 2015 was an absolute assignment and that the COH therefore need not be named as a party. However, the defendants failed to file any appeal to vary or set aside the LHCJ substantive finding on the said issue. We are of the opinion that the defendants' failure to file a notice of appeal will disable them from mounting any challenge on the LHCJ's finding on the said issue. We find support in the Federal Court's decision in the case of *Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors* [2016] 5 MLJ 557; [2016] 8 CLJ 149. Federal Court held that:

> [16] We also agree with the Court of Appeal's finding that it had considered the clear provisions under r 5 of the RCA 1994, and holding that r 5 of the RCA 1994 provided for an appeal to be lodged against the whole or part of any judgment or order of court, and such an appeal in contrast to a cross-appeal is by way of a re-hearing. *The word 're-hearing' used clearly anticipated a review or regurgitation before the appeal court of all the points and arguments taken at the court below. Hence, if it was the substantive finding of the court that was intended to be attacked, it behoved upon the party aggrieved to file a proper notice of appeal.*
>
> [17] We noted that the Court of Appeal's decision on the issues raised in the present appeal has been recently followed by another panel of the Court of Appeal in the case of *Pengerusi Suruhanjaya Pilihanraya Malaysia (Election Commission of Malaysia) v See Chee How & Anor* [2016] 3 MLJ 365; [2015] 8 CLJ 367 wherein Abdul Rahman Sebli JCA had this to say:
>
> > [81] In the appeal before us, the High Court's refusal to grant prayers (a) and (b)

of the application is a decision that is adverse to the respondents and appealable at their instance. The respondents should have filed a separate notice of appeal if they wanted the decision to be reversed or set aside and not by filing a cross-appeal as was done in this case.

[18] *It is our considered view that since the High Court found that a valid and binding agreement was concluded between the plaintiff and the first defendant and such a finding being adverse against the first defendant, the first defendant should have filed a separate notice of appeal ie if the first defendant wanted the aforesaid decision to be reversed or set aside*.

[19] Useful reference can also be made to the provision of s 67(1) of the Courts of Judicature Act 1964 ('the CJA 1964') which provides as follows:

67 Jurisdiction to hear and determine civil appeals

(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.

[20] *We are of the view that s 67(1) of the CJA 1964 clearly provides that a litigant has the right of appeal to appeal against 'any judgment or order of any High Court'. It is therefore trite that such an appeal must be filed pursuant to r 5 of the RCA 1994*. (Emphasis added.)

[25] Even if, the defendants had filed a notice of appeal to challenge the LHCJ finding on the issue, we still find that there is no appealable error in the LHCJ's finding on the said issue. Federal Court in the case of *UMW Industries Sdn Bhd v Ah Fook* [1996] 1 MLJ 365; [1996] 1 CLJ 379 laid down the following conditions for effecting absolute legal assignments:

(1) that the assignment must be in writing under the hand of the assignor;

(2) that the assignment must be absolute and not by way of charge only; and

(3) that express notice in writing must have been given to the person liable to the assignor under the assigned chose in action.

Federal Court further held that:

If the assignment fulfils all the above conditions, it would transfer absolutely the chose in action and the right to sue upon it in the assignee's own name.

As to the assignment in writing, no particular form is necessary but it must be absolute ie one that purports to pass the entire interest of the assignor in the chose in action. Thus, in *Curran v Newpark Cinemas Ltd* [1951] 1 All ER 295 CA Jenkins LJ dealing with s 136(l) of the Law of Property Act 1925 (English) the equivalent of which in our law is s 4(3) of the Civil Law Act 1956, said (p 299 F-H):

It is, no doubt, true that s 136(1) does not require, any particular form of

assignment, or that the notice given to the debtor should necessarily have been given by the assignee. The sub-section does, however, clearly postulate that, whatever its form, there should be a document amounting to an absolute assignment by writing under the hand of the assignor. Given such an assignment, and given the requisite notice to the debtor, the assignment (to put it shortly) is to operate as a legal assignment of the debt in question.

[26] Back to the issue of whether DOA 2015 is an absolute assignment under sub-s 4(3) of the CLA 1956, firstly, it is undisputed fact that the DOA 2015 was documented in writing and was given under the hand of the COH, the assignor to the plaintiffs, the assignees.

[27] Secondly, looking at the provision under cl 13 of the DOA 2015, it is crystal clear that COH has assigned all rights under the guarantee to the plaintiffs to enable them to commence legal action against the defendants, the directors of Yusen Jaya. The language used in the DOA 2015 is simple and straight forward. The words 'assigned all rights' used are clear and unambiguous. So, we are of the view that we could not infer any other meaning to the word 'all' than its ordinary meaning that is, 'each and every' as submitted by the counsel for the plaintiffs in his written submission. Its means that, the COH wanted to assign his entire right to the plaintiffs even though the words 'absolute' was not used.

[28] Thirdly, as to the notice in writing that must have been given to the person liable to the assignor under the assigned chose in action, evidence shows that solicitors for the plaintiffs did serve the notice of the assignment on both defendants via their former solicitors on record who acknowledged receipt. We are of the opinion that the notices are sufficient to fulfil the third condition required under sub-s 4(3) of the CLA 1956. The said provision does not state who should give the notice of assignment. Therefore, we cannot accede to the counsel for the defendants' contention that the notice of assignment is defective because notice ought to have been given by the COH, instead of the plaintiffs.

[29] In light of what has been stated above, we are of the same opinion with the LHCJ and counsel for the plaintiffs' contention that the DOA 2015 had fulfilled all conditions that are required under sub-s 4(3) of the CLA 1956 to be an absolute assignment.

[30] Furthermore, we also agree with the counsel for the plaintiff's alternative argument that even if the DOA 2015 does not comply with sub-s 4(3) of the CLA 1956, the plaintiffs may exercise their rights as equitable assignees. Federal Court in the case of *Public Finance Bhd v Scotch Leasing Sdn Bhd (in receivership) (Perwira Habib Bank Malaysia, Intervener)* [1996] 2 MLJ

369; [1996] 3 CLJ 635 held at p 381 (MLJ); 649 (CLJ) that:

> At common law, (in the special sense now of its being distinguished from rules in equity), contractual rights, eg, as to debts were not assignable, ie, transferable to another person without the consent of both parties to the contract conferring such contractual rights. *Equity stepped in and has long allowed such assignment of such debts to another person who is not privy to the contract in respect of such debts, without at all the consent of the debtor, see eg, Brice v Bannister* [1878] 3 QB 569 *and even without notice to the debtor, see Kelly v Selwyn* [1905] 2 Ch 117*, and Ward v Duncombe* [1893] AC 369. *Such assignments as so allowed by equity are called equitable assignments.*
>
> The validity of such equitable assignments is not affected by any failure to comply with requirements as laid down in s 4(3) of the Civil Law Act 1956 for an assignment that so complies has been described as a statutory assignment; being so statutory for such an assignment has the sole intended effect of facilitating an assignee to sue in his own name directly irrespective of whether the chose in action is an equitable chose in action or a legal chose in action, (not, be it noted, whether an assignment is equitable or statutory). By being a statutory assignment itself, the 'statutoriness' of such an assignment, ipso facto, does not prevail over an earlier equitable assignment, and this is so even with the added factor that the assignee involved in a statutory assignment took the assignment for value without notice of an earlier equitable assignment, eg see *Pfeifer v Arbuthnot* [1988] 1 WLR 150. (Emphasis added.)

[31] As to the effectiveness of the DOA 2015, counsel for the defendants forwarded at least five arguments before us. In gist, firstly, counsel for the defendants argued that the wordings in cl 2 of the guarantee in their plain, ordinary and popular meaning mean that it was to indemnify the COH and not the plaintiffs and therefore, the plaintiffs claim is inconsistent with their own pleaded case. Secondly, cl 2 of the guarantee is not an indemnity as defined under the law and at best is akin to an agreement to agree. Thirdly, there was no evidence to prove that the COH had suffered any damage or loss, nor had the COH demanded or informed the defendants of any such damage or loss. Fourthly, the assignees cannot be in a better position than the assignor and therefore, as the COH suffered no loss or damage, the plaintiffs' claim for damage or loss is without any legal basis. Fifthly, counsel for the defendants harping heavily upon the argument that the COH cannot assign his statutory duty to the plaintiffs.

[32] To deal with the issues of the effectiveness of the DOA 2015 as argued by counsel for the defendants, we will consider all five arguments together since they are interrelated. As to the first and second arguments, part of it relates to the issue of the interpretation of the cl 2 of the DOA 2015 which we will address later.

[33] Before going into the merits of the arguments forwarded by counsel for

A the defendants, it is appropriate for us to first look at the purpose of the law being enacted related to housing development. The 1978 Enactment which is in pari materia with the Housing Development (Control and Licensing) Act 1966 (Act 118) is designed to regulate the housing development industry and more importantly to protect the interests of house buyers. Quite clearly, Act
B 118 or in our case the 1978 Enactment is a piece of social legislation enacted to protect house buyers from housing developers. Suffian LP in the Supreme Court case of *SEA Housing Corp Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 at p 34 when explained why certain paras in r 12 made under Act 118 could not be allowed to be circumvented had said that:
C

> It is common knowledge that in recent years, especially when government started giving housing loans making it possible for public servants to borrow money at 4% interest per annum to buy houses, there was an upsurge in demand for housing, and that to protect home buyers, most of whom are people of modest means, from rich and powerful developers, Parliament found it necessary to regulate the sale of houses
D and protect buyers by enacting the Act.

Then, VC George J (as he then was) in *Khau Daw Yau v Kin Nam Realty Development Sdn Bhd* [1983] 1 MLJ 335 at p 341 held that:

E

> The scheme of the Housing Developers (Control and Licensing) Act 1966 and of the Rules of 1970 is to provide a measure of protection to purchasers of housing accommodation in a housing development against unscrupulous developers.

F The purpose of the Act 118 is to protect house buyers was again observed by Mohd Azmi FCJ (as he then was) in *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1985] 1 MLJ 285. At p 290 His Lordship held that:

> ... The attempt of the appellants to contract out of the Act is clearly not a device
G which can be described as legitimate. It is an open defiance of the Housing Developers legislation. Having regard to the policy and objective of Housing Developers Act 1966 and the 1970 Rules made thereunder the protection afforded by this legislation to house buyers is not merely a private right but a matter of public interest which Parliament has intended to protect from being bargained away or
H renounced in advance by an individual purchaser (see the principle enunciated by the House of Lords in *Johnson v Moreton* [1978] 3 All ER 37, 56 and applied by this court in *SEA Housing Corporation v Lee Poh Choo* [1982] 2 MLJ 31. ...

Then, Lord Templeman had this to say when the case went on appeal to the
I Privy Council as can be seen in [1988] 1 MLJ 69 at p 71:

> It is not surprising that the co-operative society rejected a draft building contract which appeared to flout the terms of the Act of 1966 and was inconsistent with the express provisions of the first contract. The appellants argue that the Act of 1966 does not apply where land is sold and is then developed. This argument makes

> nonsense of an Act which is clearly designed to protect purchasers from developers, and those purchasers need protection whether the sites of houses are sold before or contemporaneously with or after completion of the houses.

Recently, in a strongly worded 'Introduction' in the case of *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 MLJ 60 at p 70, Federal Court observed that:

> [1] The phrase 'social legislation' attached to the Housing Development (Control and Licensing) Act 1966 ('the HDA 1966') and its ensuing subsidiary legislation ie the Housing Development (Control and Licensing) Regulations 1989 ('the HDR 1989') is not merely a fanciful label. In disputes between home buyers and housing developers, its significance lies in the approach taken by the courts to tip the scales of justice in favour of the home buyers given the disparity in bargaining power between them and the housing developers.

[34] Bearing those principles in mind, we will deal with the merits of the counsel for the defendants' arguments. To begin with, it is not disputed that the guarantee was given by the defendants to the COH and not to the plaintiffs. On this issue, we have to look at the purpose of having the guarantee. As required under the 1978 Enactment and 1980 Rules, the COH had asked the defendants to execute the guarantee as part of the processes to get the licence for the housing project and the advertisement and sale permit for the housing project approved.

[35] Under the guarantee, the defendants agreed to jointly and severally guarantee the due and performance of the housing project by Yusen Jaya. The defendants further agreed to indemnify the plaintiffs of all loss or damage caused to them arising from any breached of obligations by Yusen Jaya. Without the guarantee, the COH had the discretion not to approve the licence to allow the development of the housing project by Yusen Jaya. After the licence had been issued by the COH and upon Yusen Java's failure to observe its obligations in the housing project, surely there is a right or chose in action for the COH to make a claim to enforce the guarantee against the defendants on behalf of the plaintiffs. If not, it renders that the guarantee issued by the defendants to the COH meaningless.

[36] As a regulator or a custodian of the 1978 Enactment, the COH is well equipped with the power to ensure that the plaintiffs rights are protected. We cannot agree with counsel for the defendants' contention that the guarantee only to indemnify the COH and not the plaintiffs. In the contrast, we agree with the counsel for the plaintiffs' submission that The guarantee is not an assignment of a bare right to action or to litigate because the plaintiffs have a genuine and legitimate interest in taking over the assignment. The plaintiffs are legitimately exercising their legal right to enforce the judgment sums which was

awarded by the High Court against Yusen Jaya in Suit K-79. On this point, we find support in the illustration and the decision of the House of Lords in *Trendtex Trading Corp v Credit Suisse* [1980] 3 All ER 721 as per Lord Roskill held that:

> My Lords, just as the law became more liberal in its approach to what was lawful maintenance, so it became more liberal in its approach to the circumstances in which it would recognise the validity of an assignment of a cause of action and not strike down such an assignment as one only of a bare cause of action. *Where the assignee has by the assignment acquired a property right and the cause of action was incidental to that right, the assignment was held effective. Ellis v Torrington* [1920] 1 KB 399 *is an example of such a case. Scrutton LJ, stated, at pp 412–413, that the assignee was not guilty of maintenance or champerty by reason of the assignment he took because he was buying not in order to obtain a cause of action but in order to protect the property which he had bought. But, my Lords, as I read the cases it was not necessary for the assignee always to show a property right to support his assignment. He could take an assignment to support and enlarge that which he had already acquired* as, for example, an underwriter by subrogation: see *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101 My Lords, I am afraid that, with respect, I cannot agree with the learned Master of the Rolls [1980] QB 629, 657 when he said in the instant case that 'The old saying that you cannot assign a 'bare right to litigate' is gone'. I venture to think that that still remains a fundamental principle of our law. *But it is today true to say that in English law an assignee who can show that he has a genuine commercial interest in the enforcement of the claim of another and to that extent takes an assignment of that claim to himself is entitled to enforce that assignment unless by the terms of that assignment he falls foul of our law of champerty, which, as has often been said, is a branch of our law of maintenance.* For my part I can see no reason in English law why Credit Suisse should not have taken an assignment to themselves of Trendtex's claim against CBN, for the purpose of recouping themselves for their own substantial losses arising out of CBN's repudiation of the letter of credit upon which Credit Suisse were relying to refinance their financing of the purchases by Trendtex of this cement from their German suppliers. My Lords, I do not therefore think that My Brodie is correct in criticising the judgment of Oliver LJ on the ground that the learned Lord Justice failed to distinguish between the interest necessary to support an assignment of a cause of action and the interest which would justify the maintenance of an action by a third party. I think, with respect, that this submission involves over-analysis of the position, *The court should look at the totality of the transaction. If the assignment is of a property right or interest and the cause of action is ancillary to that right or interest or if the assignee had a genuine commercial interest in taking the assignment and in enforcing it for his own benefit, I see no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance.* (Emphasis added.)

[37] Coming back to the appeal before us, it is an undisputed fact that the plaintiffs succeeded in their claim against Yusen Jaya in Suit K-79. The plaintiffs' claim is a result of Yusen Java's failure to observe its obligation under the SPA entered into with the plaintiffs. The defendants consciously agreed to give the guarantee to the COH to indemnify the plaintiffs from Yusen Jaya's

failure. Based on those backdrop, we are of the considered view that the COH in his capacity as a regulator under the 1978 Enactment has the necessary residual power to pursue the chose in action to recover losses and damages suffered by the plaintiffs even though the COH had suffered no loss or damage.

[38] Furthermore, it is now settled law that guarantees are not to be construed any different way from any other contract. Federal Court in the case of *Kong Ming Bank Berhad v Leong Ho Yuen* [1982] 2 MLJ 111 succinctly made the following observation:

> We shall deal first with the contention on behalf of the respondent that as he is merely the guarantor for the Company, the court in construing a contract of guarantee should give it a lighter construction. Reference is made to *Oriental Bank of Malaya Ltd v N Subramanian* [1958] 1 MLJ 35, 38 where Whyatt CJ (Singapore) relying on a statement by Fry J in *Lloyd's v Harper* 16 Ch D 290 said:
>
> > A guarantee, like every other contract, must be construed reasonably; it must be construed by the words used but also with regard to the surrounding circumstances.
>
> This statement does not bear out the proposition that a contract of guarantee is to be construed favourably to the guarantor. It is now settled law that guarantees are not to be construed in any different way from any other contract. See *Esheby v Federated European Bank Ltd* [1932] 1 KB 254, *Nicholson v Paget* (1832) 1 C & M 48; 2 LJ (Ex) 18; 149 ER 309 and *Blest v Brown* (1862) 4 De GF & J 367; 376 45 ER 1225.

[39] Under s 79 of the Contract Act 1950 ('the CA 1950'), a 'contract of guarantee' is defined as a contract to perform the promise or discharge the liability of a third person in the event of his default. The person who gives the guarantee is called the 'surety', the person in respect of which default the guarantee is given is called the 'principal debtor' and the person to whom the guarantee is given is called the 'creditor'. Therefore, there must be three parties involved under a contract of guarantee: the surety, the principal debtor and the creditor. It is an undertaking to guarantee the obligations of a named principal. A contract of guarantee is essentially a collateral contract by which a guarantor undertakes to answer for the default of the principal debtor to the creditor. As regards to the liability, the guarantor only owes a secondary obligation to the creditor to make good the particular defaults of the principal debtor. See the cases of *Yeoman Credit Ltd v Latter & Anor* [1961] 2 All ER 294, *South East Asia Insurance Bhd v Nasir Ibrahim* [1992] 2 MLJ 355; [1992] 4 CLJ 1801 and *Bank Pembangunan Malaysia Bhd v Spring Hill Bioventures Sdn Bhd* [2020] 4 MLJ 42; [2020] 4 CLJ 15.

[40] Under the guarantee, the defendants are the 'surety', Yusen Jaya is the 'principal debtor or principal person' and the COH is the 'creditor or guaranteed person'. The guarantee given by the defendants, the 'surety', to the

COH, the 'guaranteed person', was to ensure the full completion of the housing project within the stipulated time and for the due performance of the several obligations of Yusen Jaya, the 'principal person' in relation to the completion of the housing project and in the guarantee, defendants agreed to indemnify the plaintiffs against loss and damage caused to them arising or resulting from Yusen Jaya's failure to complete the project within the stipulated time for completion, or its breach of obligations thereto. In short, the COH has a proprietary right or a chose in action to act against the defendants and can seek to enforce the right or the chose in action under the guarantee against the defendants.

[41] Therefore, we are of the opinion that if the COH wishes to assign his right or chose in action against the defendants to the plaintiffs, he can do so on the basis that the plaintiffs have a genuine commercial interest in the enforcement of the claim against the defendants. On a proper reading of the DOA 2015, the clear intention of the parties was that, the COH's rights to the chose in action to be absolutely transferred to the plaintiffs. Having acquired the chose in action pursuant to the DOA 2015, the plaintiffs can step into the shoes of the COH. The plaintiffs have a good cause of action against the defendants and can independently bring the action against the defendants under the guarantee.

[42] Finally, we will address the issue that was heavily harping upon by counsel for the defendants in his argument that is, the COH cannot assign his statutory duty to the plaintiffs. Counsel for the defendants argued that the DOA 2015 was a statutory document issued to the COH by the defendants as required under the 1978 Enactment. Therefore, it is not a commercial document per se. Hence, the COH could not assign his statutory duty or right to the plaintiffs to do a statutory act and if the assignment is valid, the COH does not even have any residual power left to control since he has wholly abdicated his statutory power to the plaintiffs. Counsel for the defendants further argued that it is trite law that unless the statute expressly provides so, assignment of statutory power cannot be done. He relied on Federal Court cases in *Ang Ming Lee v Menteri Kesejahteraan Bandar* [2020] 1 MLJ 281(*Ang Ming Lee*'s case) and *Palm Oil Research and Development Board Malaysia v Premium Vegetables Oils Sdn Bhd* [2005] 3 MLJ 97 *(Palm Oil Research*'s case).

[43] With due respect, we are not in agreement with counsel for the defendants' submission on this issue. The Federal Court cases referred to by counsel for the defendants are distinguishable. In *Ang Ming Lee*'s case, the issue before the Federal Court was whether the Controller could grant an extension of time to a developer. The Federal Court found that the Controller could not grant such an extension on the reason that the Minister could not delegate to the Controller what it could regulate under the Act 118. Meanwhile, in *Palm*

Oil Research's case, it reiterates an important principle that a subsidiary legislation such as the *gazette* order cannot enlarge the mother Act. Furthermore, a provision in a statute conferring power on a member of the Executive to enact subsidiary legislation must be construed strictly, particularly where the subsidiary legislation is one that imposes a financial levy, be it tax or charge or cess, upon the whole or any section of the public.

[44] In the present appeal before us, the COH merely assigned his right or the chose in action to the plaintiffs to enable them to commence legal action against the defendants under the guarantee. That's all. There is no delegation of power under the 1978 Enactment or under the 1980 Rules involved as compared to the facts of the cases decided by the Federal Court in *Ang Ming Lee*'s case or in *Palm Oil Research*'s case.

[45] Therefore, we are of the considered view that the LHCJ was right in holding that the DOA 2015 was a valid legal assignment and had complied with all conditions as required under sub-s 4(3) of the CLA 1956. The plaintiffs have legally acquired the chose in action that was transferred from the COH under the DOA 2015 to file an action against the defendants to materialise the judgment sums.

The interpretation of the guarantee

[46] For ease of reference and for better understanding of the terms used in the guarantee, we produced the guarantee in whole as follows:

LETTER Of GUARANTEE OF COMPLETION OF HOUSING DEVELOPMENT BY DIRECTORS

TO,

THE CONTROLLER OF HOUSING,

MINISTRY OF LOCAL GOVERNMENT AND HOUSING,

88999 KOTA KINABALU

IN CONSIDERATION OF YOU GRANTING A DEVELOPER'S LICENCE, ADVERTISEMENT AND SALE PERMIT FOR THE HOUSING AT DEVELOPMENT PROJECT KNOWN AS *TAMAN BUKIT SAUJANA* AT CL, TL *NO 01514525* SITUATED AT *JALAN BANTAYAN OFF JALAN TUARAN MILE 3 VS KQTA KINABALU, SABAH* TO OUR COMPANY DULY INCORPORATED IN MALAYSIA, HOUSING DEVELOPER HAVING ITS REGISTERED OFFICE AT *LOT 2215 SECTION 66. JALAN BENGKEL. OFF JALAN UTAMA PENDING INDUSTRIAL ESTATE 93450 KUCHING, SARAWAK*.

1. I/WE THE UNDERSIGNED BEING THE DIRECTORS OF THE SAID COMPANY, HOUSING DEVELOPER, HEREBY JOINTLY AND SEVERALLY GUARANTEE THE DUE PERFORMANCE OF THE SEVERAL OBLIGATIONS OF THE SAID COMPANY, HOUSING DEVELOPER, AND

WILL ENSURE THE FULL COMPLETION OF THE HOUSING DEVELOPMENT PROJECT AS A FORESAID UNTIL THE HOUSES SHALL HAVE BEEN DELIVERED TO THE PURCHASERS AND CERTIFIED FIT FOR OCCUPATION, WITHIN THE STIPULATED PERIOD OF COMPLETION, AND IN ACCORDANCE WITH THE HOUSING DEVELOPMENT (CONTROL AND LICENSING) ENACTMENT 1978 AND ALSO ANY RULES MADE THEREUNDER AND ANY OTHER CONDITIONS IMPOSED BY THE CONTROLLER OF HOUSING FROM TIME TO TIME.

2. I/WE FURTHER HEREBY AGREE THAT I/WE SHALL JOINTLY AND SEVERALLY INDEMNIFY THE PURCHASERS OF THE HOUSES AGAINST ALL LOSS OR DAMAGE CAUSED TO THEM OR ANY OF THEM ARISING OR RESULTING FROM ANY BREACH OF OBLIGATIONS BY THE SAID COMPANY, HOUSING DEVELOPER, OR FAILURE TO COMPLETE THE SAID HOUSING DEVELOPMENT WITHIN THE STIPULATED TIME OF COMPLETION.

Dated AT *Kuching* THIS 11th DAY OF *June, 2002*.

[47] To begin with, we look at the LHCJ's decision in his grounds of judgment (GOJ) related to the interpretation of the terms of the guarantee. At para [19] of the GOJ, The LHCJ acknowledge that the contents of the guarantee are divided into two parts. In the first part, the defendants agreed to guarantee the due performance of the several obligations by Yusen Jaya and would ensure full completion of the housing project until the delivery of the houses to the purchasers and certified fit for occupation within the stipulated period of completion. For the second part, the defendants agreed to indemnify the purchasers of the houses against losses arising or resulting from any breach of Yusen Java's obligations or its failure to complete the housing project within the stipulated time of completion.

[48] In reference to the plaintiffs' claim, the LHCJ posted the following question:

> [22] The question I have to answer, is firstly, whether in the second part of the guarantee, the defendants had agreed to indemnify the purchasers/the plaintiffs against all losses and damages incurred as the result of the breaches of the SPA entered into between the plaintiffs and Yusen Jaya (hereafter referred to as 'the first interpretation'). Alternatively, whether the defendants only agreed to indemnify the purchasers/the plaintiffs for losses which they may suffer arising out of Yusen Jaya's failure to complete the Project and for the payment of LAD in the event of delay in the completion of the same? (hereafter referred to as 'the Second Interpretation').

His Lordship chose to favour the second interpretation as stated in para [23] of the GOJ, namely to indemnify the plaintiffs for losses which they may have suffered in the event that the housing project is uncompleted or if completed, to indemnify the plaintiffs for the LAD which they have suffered. He gave the following reasoning:

[24] Firstly, the heading of the Guarantee clearly indicated that the purpose of the guarantee was to guarantee the completion of the Project. This heading has to be read together with the content of the guarantee (see *Farstad Supply v Enviroco Ltd* [2010] UKSC 18 p 87 at p 93 para 22; *Gurdeep Singh ail Melkha Singh v Malaysian Airline System Bhd* [2015] 8 MLJ 24).

[25] In respect of the guarantee given by the first and second defendants to the Housing Controller, which can be found at para 1 of the guarantee, I find that the guarantee was to ensure the full completion of the project within the stipulated time for completion, and for the due performance of the several obligations of Yusen Jaya in relation to the completion of the project.

[26] Likewise, the indemnity given by the first and second defendants to the Housing Controller, which can be found at para 2 of the guarantee, the same must be read within the context of the guarantee to the Housing Controller to complete the project (at para 1 of the guarantee). It was to indemnify the purchasers/plaintiffs against loss and damage caused to them arising or resulting from Yusen Jaya's failure to complete the project within the stipulated time for completion, or its breach of obligations in relation thereto.

[49] On the intention of the Legislature to impose conditions on the directors of the housing developers' company to agree to indemnify the house buyers, the LHCJ's opinion is as follows:

[30] It must not be the intention of the Legislature to impose on the individual directors an agreement to indemnify the purchasers of all the obligations which the developer had undertaken under the sale and purchase agreements, bearing in mind that a company is a separate tegal entity from its shareholders and directors. If such were the intention of the Legislature, they would have made the directors of the developer company a party to the prescribed form of sale and purchase agreement for the housing development. They did not do so.

Then, the LHCJ made the following observation and conclusion:

[31] The plaintiffs' claim in the Suit K79 was in fact not in respect of Yusen Jaya's failure to complete the project. Their claims were principally for damages suffered for the poor construction of the houses and for iate delivery of possession.

[32] I also note that the learned trial judge in Suit K79 found that the defects in the houses built could not be remedied without completely demolishing them and rebuild them from ground up. In such a case, the plaintiffs were clearly entitled to say there was a total failure of consideration and elect to rescind the sale and purchase agreements. They were then entitled to claim for the return of the purchase prices paid to the Yusen Jaya under s 40 of the Contracts Act 1950.

[33] The plaintiffs in the Suit K79 instead chose to affirm the sale and purchase agreements, accepted completion of the houses and sued for LAD and damages for the defective works. In such a case, the damages awarded in Suit K79 was not for Yusen Jaya's failure to complete the Project, except that a small part of the judgment sum, namely the sum of RM305,681.67 was awarded for LAD for failure to complete the houses within the stipulated period of completion.

A [34] In view of my above interpretation of the agreement to indemnify in the second part of the guarantee, I find that the defendants had not agreed to indemnify the plaintiffs for losses which they may have suffered as a result of Yusen Jaya's breaches of the SPA, save to complete the project within the stipulated time of completion. And I recognise that the plaintiffs had received a sum of RM1,338,728 as partial B settlement of the judgment sum awarded in the K79 Suit. This was revealed during the cross-examination of PW1 that the Housing Controller had called upon the bank guarantee furnished by Borneo Housing Mortgage Finance on behalf of Yusen Jaya. This sum for partial settlement had exceeded the LAD awarded in Suit K79, which is RM305,681.67.

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[50] Now, the first thing to do is to look at the terms of guarantee. The language used in the guarantee is vital. The liability of the guarantor depends very much on the language of that instrument and the nature of the liability it creates. Thus, if the language of the guarantee is clear, its plain and ordinary D meaning must be given. See Supreme Court decision in *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad* [1989] 3 MLJ 155 (*Orang Kaya Menteri Paduka*'s case) which was referred to by the Federal Court case in *The Pacific Bank Bhd (sued as guarantor) v Kerajaan Negeri Sarawak* [2014] 6 MLJ 153.

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[51] In interpreting the guarantee, we are guided by the Federal Court's decision in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597. At pp 620–621, the Federal Court held that:

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[42] Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was G reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract. See *Investors' Compensation Scheme Ltd v West Bromwich Building Society, Investors' Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 All ER 98. As Lord H Clyde said in *Bank of Credit and Commerce International SA (in liquidation) v Ali & Ors* [2001] 2 WLR 735:

> The knowledge reasonably available to them (that is to say the parties to the contract) must include matters of law as well as matters of fact. The problem is I not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they may never in fact have had any conscious intention in relation to that eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and

> realistic. The meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement. The exercise is not one where there are strict rules, but one where the solution is to be found by considering the language used by the parties against the background of the surrounding circumstances.

[52] The background knowledge of the parties to the guarantee must be considered in determining the intention behind it. This background knowledge can be evaluated from the evidence adduced or by inference made from the circumstantial evidence before the court, The background knowledge can include anything which would have affected the way in which the wordings were used in the guarantee. In *Orang Kaya Menteri*'s case the Supreme Court had observed that:

> ... The document in question, that is, the letter of guarantee signed by the third defendant, like every other guarantee, must be construed according to the intention of the parties as expressed by the language they have employed, understanding it fairly in the sense in which it is used. This intention is best ascertained by looking to the relative position of the parties at the time the letter of guarantee is written ...

[53] Another element to consider as regards to knowledge or the intention of the contracting parties in a contract of guarantee is the nature of the dealing or the business involved. Where it is clear from the background of the case that the contracting parties involved in a commercial dealing, the interpretation of the language or the words used in the instrument has to be interpreted according to the business common sense and must also meet the reasonable expectation of a sensible businessman. See the Court of Appeal decision in the case of *MBf Insurans Sdn Bhd v Lembaga Penyatuan & Pemulihan Tanah Persekutuan (FELCRA)* [2008] 2 MLJ 398; [2007] 6 CLJ 639.

[54] Looking at the guarantee as a whole, without doubt, in its plain and ordinary meaning means that the defendants have jointly and severally agreed to guarantee the due performance of Yusen Jaya. They will ensure the full completion of the housing project until the delivery of the houses to the buyers with the certification of fitness for occupation within the stipulated time as agreed. It did not stop there. The defendants also agreed to jointly and severally indemnify the plaintiffs for any loss or damage caused to them or any of them if Yusen Jaya breaches its obligations under the SPA or fails to complete the housing project within the time frame specified.

[55] With respect, we are unable to accept the LHCJ's interpretation on the construction of the guarantee. Even though the guarantee consist of two clauses, it must be read in harmony. The words 'I/WE FURTHER HEREBY AGREE' at the beginning of the second clause indicate that both clauses must be read conjunctively. By splitting the interpretation of the terms of the

guarantee into two parts as what was done by the LHCJ, we are of the view that His Lordship could not properly address his mind to find the real plain and ordinary meaning of the clauses in the guarantee in relation to the nature of the liability shouldered by the defendants under the guarantee. Upon proper reading of the terms of the guarantee, we find that the defendants had agreed to jointly and severally:

(a) guarantees the due performance of the several obligations of Yusen Jaya;

(b) ensure the full completion of the housing project up to the delivery of the houses to the buyer together with the certificate of fitness for occupation within the stipulated time; and

(c) indemnify the plaintiffs against all loss or damage caused to them or any of them arising or resulting from any breach of obligations by Yusen Jaya, or failure to complete the said housing development within the stipulated time.

[56] As noted earlier, the Act 118 or in our case, the 1978 Enactment is a social legislation. All requirements under the law should be interpreted in line with the purpose or the intention of the legislator who passed the law. One of the requirements is that the directors of a housing development company have to give an undertaking via a formatted letter of guarantee specified under the law before a licence for the housing development is issued. The rationale behind the requirement is easy to understand. It must be interpreted that the guarantee given by the directors is not just a lip-service. It provides a measure of protection to house buyers against unscrupulous developers. We find that the LHCJ failed to take a purposive approach in interpreting the guarantee.

[57] Finally, we also find that the LHCJ failed to take into consideration the background facts of the contracting parties in his interpretation of the guarantee. The defendants are the directors of a housing developer company. It is undisputed that the guarantee was issued by the defendants to the COH in compliance with the 1978 Enactment and the 1980 Rules to secure a licence for Yusen Jaya to develop the housing project. As a director of Yusen Jaya, the defendants should know the purpose of such requirement under the law and should foreknow the risk that they have to bear if Yusen Jaya fails to deliver the houses in the housing project to the plaintiffs on time or fails to observe its obligations under the SPA.

Whether the plaintiffs' claim barred by limitation

[58] Counsel for the defendants submitted that even if the defendants are liable to the plaintiffs under the guarantee and the DOA 2015, the plaintiffs' claim is barred by the s 3 of the SLO. It was argued that if the COH has a claim against the defendants under the guarantee to indemnify him against all loss or

damage caused to the plaintiffs by Yusen Jaya as alleged at para 10 of the plaintiffs' statement of claim, the plaintiffs ought to have claimed against the COH when the housing project was not completed until 2005 or at the latest when the plaintiffs commenced their K79 suit in 2006. Therefore, the COH ought to have claimed against the defendants at the same time. Instead, the plaintiffs only commenced this action in September 2015, which is 11 years later. The limitation governing a breach of a written contract under SLO is only six years. Counsel for the defendants referred to items 94 and 95 of the SLO and the Court of Appeal decision in *Bounty Dynamics Sdn Bhd v Chow Tat Ming & 175 ors* [2016] 1 MLJ 507.

[59] In reply, counsel for the plaintiffs argued that the respondents' contentions have no merit on the reason that para 2 of the guarantee which is the indemnity clause that the plaintiffs are claiming under requires that liability of the Yusen Jaya be first established by judgment and time will only begin to run from the date of establishing the liability. In support of this proposition, counsel for the plaintiffs rely on the Privy Council decision in *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1, that is, in the event that a housing developer fails to complete and deliver vacant possession of the building within 18 months from the date of the agreement, the cause of action accrues not at the expiration of 18 months from the date of the agreement, but only when the damages due under the indemnity can be calculated and ascertained. In other words, until that sum has been ascertained, it does not become due and cannot be sued for.

[60] On the issue of the statutory limitation under the SLO, we are of the considered view that the plaintiffs' claim against the defendants is not barred by limitation. We agree with the counsel for the plaintiffs' contention that the judgment sums awarded to the plaintiffs against Yusen Jaya in Suit K-79 was given on 27 January 2011. Then, the plaintiffs entered into the DOA 2015 with the COH on 10 February 2015 and thereafter, the plaintiffs filed their action in the High Court on 14 September 2015 to enforce the guarantee against the defendants. On those facts, we are of the view that the time started to run against the plaintiffs to take action against the defendants from the date of the DOA 2015, that is, the date when the plaintiffs acquired the right or the chose in action from the COH.

CONCLUSION

[61] Based on the reasons adumbrated above, we unanimously find and held that there are merits in the plaintiffs' appeal which warrant appellate intervention. We allow the plaintiffs' appeal with costs. We set aside the High Court judgment.

[62] As to the amount of the judgment sums, it is not disputed that the plaintiffs had received a sum of RM1,338,728 from the bank guarantee furnished by Borneo Housing Mortgage Finance on behalf of Yusen Jaya that had been called upon by the COH. Therefore, the defendants are jointly and severally liable to pay the amount of RM3,253,644.67 being the balance of the judgment sums awarded in Suit K-79 to the plaintiffs with the interest of 5%pa from the date of filling of the writ, that is 14 September 2015.

[63] As for costs, we awarded a sum of RM50,000 here and below to be paid by the defendants to the plaintiffs, subject to allocator.

Order accordingly.

Reported by Ashok Kumar